United States Court of Appeals

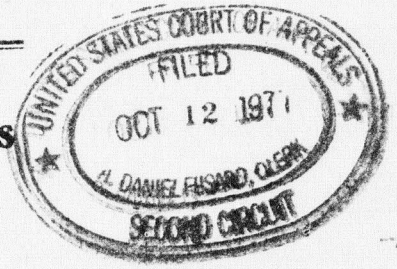
for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

77-7187

To be argued by:
I. WALTON BADER



United States Court of Appeals
For the Second Circuit

DOCKET NOS. 77-7187; 77-7271; 77-7273

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, in behalf of its membership affected and in behalf of Classes involved herein, GARY MICHAEL, MICHAEL FAGAN and MARTIN F. RANDOLPH, JR., individually and as Class Representatives, and in behalf of all other parties similarly situated and circumstanced,

Plaintiffs,

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL and MICHAEL FAGAN,

Plaintiffs-Appellants,

I. WALTON BADER,

Appellant,

-against-

TELEPROMPTER CORPORATION, TOUCHE ROSS & COMPANY, HERBERT SCHLAFLY, WILLIAM BRESNAN, MARVYN CARTON, "JOHN DOE" and "RICHARD ROE", being fictitious, the parties intended being those persons, firms, corporations and associations involved in the unlawful acts involved herein,

Defendants,

TOUCHE ROSS & CO.,

Defendant-Appellee.

HARRY LEWIS, et al.,

Plaintiffs,

-against-

TELEPROMPTER CORP., et al.,

Defendants.

Consolidated Appeal

APPELLANTS' REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-7187;77-7271;77-7273

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, etc.

Plaintiffs

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL and MICHAEL FAGAN

Plaintiffs-
Appellants

I. WALTON BADER

Appellant

-against-

TELEPROMPTER CORPORATION, et c.

Defendants

TOUCHE ROSS & CO.

Defendant-Appellee

HARRY LEWIS, et. al.

Plaintiffs

-against-

TELEPROMPTER CORP, et. al.

Defendants

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APPELLANTS' REPLY BRIEF

A reading of the Appellee's Brief indicates that, if the following issues are decided in favor of Appellants, then the District Court's determination should be reversed and the other issues in this case become moot. These issues are as follows:

1. Were the Notices of Voluntary Dismissal, filed prior to any determination of the District Court on the Rule 37 application, valid.

2. Was the Order of Judge Owen of August 16th, 1974 (and not any other direction of the Court), complied with by the plaintiffs.

3. If the Order of Judge Owen of August 16th, 1974 was not technically complied with, was it, in fact, complied with under the strictures of Rule 61 FRCP.

4. Should Judge Owen have recused himself from any further consideration of this matter when his acquaintance with counsel for TOUCHE ROSS became known and plaintiffs' counsel filed objections to Judge Owen's proceeding with the case on that ground.

5. Since the Court's Order involved disputed issues of fact, was the failure to impanel a jury a Seventh Amendment violation.

6. Were the use of evidentiary materials and statements not made officially of record valid.

Appellants submit to this Court that all of the above issues should be decided in favor of Appellants and therefore the dtermination of the District Court should be reversed.

FACTUAL ERRORS

Appellee contends, in his brief (Appellee's Brief Pg. 9) that despite the clear evidence in the record that Appellee has not answered (even as of the date of this brief) the outstanding interrogatories addressed to it on October 31st, 1973 (JA 369-374) it is somewhat "excused" from so doing by reason of a letter written by it to Judge Griesa (JA 397) and an affidavit of Mr. Eno (JA 582) claiming that Judge Griesa, by "oral order" had extended the time of TOUCHE ROSS to answer plaintiffs' interrogatories and had given TOUCHE ROSS a period of time (30 days) to answer the Amended Complaint after answers had been received to TOUCHE ROSS' interrogatories. Obviously, of course, an "oral order" is a violation of the Fifth Amendment to the Constitution of the United States. Judge Owen did, of course, in a written order (JA 438-439) extend TOUCHE ROSS' time to answer or move with respect to the Amended Complaint for 30 days after answers to the TOUCHE ROSS interrogatories had been served. Judge Owen also entered a stay order, on September 23rd, 1974 (about 11 months after plaintiffs' interrogatories had been served on TOUCHE ROSS) staying the plaintiff from further discovery until the determination of the motion involved. (This motion, however, was never decided by Judge Owen).

As Appellee points out, the propriety of Rule 37 relief is to be determined by the circumstances of the entire case and the above facts should, therefore, be brought to the attention of the Court.

Appellee contends, also, that while Appellants have pointed out to the Court that it has suffered no prejudice by the alleged "late service" of interrogatory answers, it has never so conceded. However, in response to the Appellants' contentions to this point, Appellee has never controverted this. In addition, of course, in the testimony at the hearing ordered by Judge Owen, Appellee never contended that it had been prejudiced and Appellants' attempt to inquire specifically on this point was blocked by the District Judge as follows: (JA 215)

> " Q. (to Mr. Eno by Mr. Bader)
> Is there any way that your client has been prejudiced by the fact that these interrogatory answers came in .... (The word "late" did not appear in the record because of the interruption by the District Judge)
>
> (JA 216)
> THE COURT: I don't think that is an appropriate question for this"

Appellee further contends that the conduct of Appellants' attorney criticized by the District Judge occurred at a hearing held before him and therefore the Korn vs. Franchard rationale (256 Fed. (2nd) 1206) is not applicable here. This is just not so. The alleged "hearing" related merely to the receipt by the Appellants' attorney of the RANDOLPH answers (JA 2) and the question of the attorney's conduct was not involved.

Korn, supra, requires that, under Fifth Amendment strictures, any hearing on claimed misconduct of an attorney, must be held on notice to the attorney that his misconduct is being considered, and, under Sixth Amendment strictures, notice to the attorney of his alleged misconduct must be given and he must be confronted with the witnesses against him. Also, of course, if misconduct is to be charged against an attorney based on his conduct at the hearing set on other grounds, then such action would be void under In Re Ruffalo, 390 US 544(551) where the Supreme Court said:

> "* * * These (proceedings against an attorney for misconduct) are adversary proceedings of a quasi-criminal nature. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh. * * *" (matter in parenthesis added)

Similar cases are Theard vs. United States, 354 US 278; Cole vs. Arkansas, 33 US 196; In Re Jones, 506 Fed(2nd) 527; and Burkett vs. Chandler, 505 Fed. (2nd) 217.

See also, Erdmann vs. Stevens, 458 Fed(2nd) 1205, 1210 (2 Cir. 1972).

As will be set forth, infra, Appellants' attorney was guilty of no misconduct and, in fact, his conduct was mandated by the Canons of Professional Ethics. Also, it will be demonstrated, that Appellee's attorney ENO was guilty of misconduct. These questions, however, will be, it is hoped, resolved by the Grievance Committee of the

appropriate Bar Association under this Court's ruling in W. T. Grant vs. Haines, 531 Fed(2nd) 671.

Finally, the Court was correctly advised by the Appellee, that the time of mailing of the RANDOLPH answers in California, was 1PM on September 3rd, 1974 (JA 623). On page 1 of this affidavit Mr. Randolph states the following:

> "* * *About 12 noon on that day I took these further answers to a Notary Public in San Diego California * * *"

Appellant, inadvertently, utilized the 12 noon time on page 1 rather than the 1PM time on page 2.

POINT ONE
THE NOTICES OF VOLUNTARY DISMISSAL FILED BY APPELLANTS ARE VALID AND MOOT ALL FURTHER PROCEEDINGS BY THE DISTRICT COURT.

On May 6th, 1977 Judge Owen, in making the Order appealed from herein, stated the following (which was added to the Order by the Court and not by the parties).

> "* * * This Order has no effect whatsoever on 73 Civil 3929 the existing class action. * * *"

Thus, in effect, Judge Owen has ruled that this action is not a Class Action. The case is therefore directly analagous to Baxter vs. Palmigiano, 95 Sup. Ct. 1551. Since this action, therefore, is not a Class Action, Rule 23 does not apply and the Notices of Voluntary Dismissal filed herein (JA 594, 602) are valid and oust the District Court from further jurisdiction in this case. (See point ten in Appellants' main brief).

The first Notice of Voluntary Dismissal was filed on October 9th, 1974 and was "so ordered" by Judge MacMahon on October 15th, 1974. The second Notice of Voluntary Dismissal was filed on October 28th, 1974 and was "so ordered" on January 23rd, 1976. Judge MacMahon vacated his signatures on these documents subsequently on December 8th, 1976 after Appellants had, in reliance on the Notices, had a substantial change of position in having their names withdrawn from the consolidated Class Action Complaint (See Exhibit A annexed to this Brief).

These Notices of Voluntary Dismissal, under the facts in this case, do not require a "so ordered" endorse-ment to be valid. Since they were both filed within 30 days of one another they are, in effect, a single notice and therefore dismiss the entire action. Thus Harvey Aluminum, Inc. vs. American Cyanamid Co., 2 Cir. 203 F.2nd 105 is not applicable to this action. However the rationale in Harvey Aluminum has been controverted in Plains Growers, Inc., etc. vs. Ickes-Braun Glass, Inc. 474 Fed(2nd) 250 (5 Cir. 1973). Thus, on page 253 of the opinion the Court said:

> "* *we hold that plaintiff is entitled to a dismissal against one defendant under Rule 41(a), even though the action against another defendant would remain pending.* * *"

Professor Moore, in 5 Moore's Federal Practice Sec. 41.06

pg. 1087,1088 critcizes the Harvey Aluminum rule as follows:

> " * * * the better view is that the court has power to permit the dismissal under Rule 41. And this should hold true whether it is fewer than all the defendants against whom a dismissal is sought to be taken, or fewer than all plaintiffs seek tc withdraw from the action.(emphasis supplied).

However, in the case at Bar, since the RANDOLPH Notice of Voluntary Dismissal was "so ordered" by the Court, it becomes a dismissal under Rule 41(a)(2) which reads in part as follows:

> "* * * an action shall not be dismissed at the plaintiff's instance save upon order of the court * * *"

It is true, of course, that Judge MacMahon subsequently, after the dismissal became effective, vacated his "order". However, since the dismissal once became effective the Court cannot reinstate the action to the prejudice of the adverse party. In addition, the Order of the Court, since the plaintiffs-appellants sustained a severe change of position in reliance on the Order (i.e. having their claims removed from the consolidated Class Action Complaint) the Court is, in effect, "estopped" from vacating the "so ordered" provision. Estoppel, even against a Governmental Body, may be made in appropriate instances. See, for example, C.F. Lytle Co. vs. Clark, 491 Fed.(2nd) 834; Santa Rosa Island Authority vs. F.R. Smith & Sons, Inc., 303 Fed(2nd) 576; US vs. Lazy FC Ranch, 481 Fed.(2nd) 406; US vs. Wharton, 514 Fed.(2nd) 406 and Walsonarich vs. U.S. 335 Fed.(2nd) 96.

POINT TWO
THE ORDER OF THE DISTRICT COURT OF AUGUST 16th, 1974 WAS COMPLIED WITH UNDER THE STRICTURES OF RULE 61 FRCP

In determining the Compliance with the Order of the Court of August 16th, 1974 it is important to note that any proceedings prior to the making of this Order are irrelevant to the question involved. Appellee claims, of course, and the Court states in its opinion, that for a period of more than nine months previously the Appellants had been in default of answering interrogatories. This would, in any event be irrelevant since the Court, in making the Order of August 16th, 1974 did not impose any other sanction against Appellants other than compliance thereof within 20 days. In any event, prior to the date of filing of its first answers to interrogatories, July 11th, 1974, Appellants were not required to respond to the TOUCHE ROSS interrogatories because of the extension of time granted by Judge Owen (on Appellee's Application) (JA 438-439) while, as previously, the Appellee was in default of answering Appellants' interrogatories without excuse. The interrogatories were, in fact, properly answered on July 11th, 1974 and the Court had no right to request individual answers from each plaintiff. Be that as it may, of course, the Court did not, and in fact could not, have proceeded as the Courts did in Grace vs. Fisher, 355 Fed. (2nd) 21 where there was a deliberate refusal to comply with an Order. Also, in Grace vs. Fisher, the Court granted a prior extension of time on consent of the adverse attorney. The Court's opinion in Grace is illustrative (355 F.2d. 22).

> " * * * On May 3, appellant, disregarding the direction of the District Court, refused to appear for the taking of his deposition. * * On May 24, 1965, appellant applied for an Order to Show Cause, to extend the time to submit to the taking of his deposition. * * * Appellant did not appear by June 14 Judge Palmieri found that appellant had wilfully and deliberately defied the order of the court * * *"

The facts in the present case, of course, are far different. Appellants did, in fact, answer the outstanding interrogatories on July 11th, 1974. The Court merely required "further answers" within 20 days of the date of the order. Appellants complied with the Order by, at least, answering the interrogatories in accordance with the Order and, as to those appellants that were plaintiffs at the time of the answers, signing and mailing these answers prior to the earliest due date, September 5th, 1974. The mere fact that the copies of the answers were not actual copies with the signatures and the jurat annexed, is an immaterial variance within the strictures of Rule 61.

The cases under Rule 61 hold, specifically, that where material prejudice is not caused to a party by an irregularity such irregularity will be disregarded. Thus, for example, even where the irregularity involves a substantive matter such as service of process (far more important than mere failure to place a jurat on interrogatory answer copies) mere irregularities will be disregarded.

See, for example, Southern Oil Corp. vs. Waggoner 276 Fed. 487 Mass. Bonding & Ins. Co. vs. Concrete Steel Bridge Co. 37 Fed.(2nd) 695.

Carter Electric Company vs. Travelers Indemnity Company, 382 Fed.(2nd) 567 is a recent pronouncement on interrogatory questions. In that case the District Court denied a motion to compel a party to give the adverse party further answers to interrogatories. Nevertheless the Appellate Court held the error was harmless (even though the further answers should have been ordered) because the party obtained the information from other sources. This case, of course, is directly analagous to the situation in the case at Bar. Here the unsigned answers gave the Appellee all of the information that there was to give. The answers of IIPL, RANDOLPH and FAGAN were fully in accordance with the original answers served on September 5th, 1974. The answers of GARY MICHAEL, served only a few days late, gave all of the required information and, of course, the original unsigned answers served on September 5th, 1974 were fully ratified by GARY MICHAEL (JA 742, 743), (JA 745). In his affidavit of May 31st, 1976 Mr. Michael states the following:

> "* * * The answers prepared byMr. Bader (and served September 5th, 1974) were, as far as he knew, accurate and I hereby ratify these original answers as originally prepared without corrections. * * *" (matter in parenthesis added)

Appellee states, in his brief, that the answers of RANDOLPH as signed on September 3rd, 1974 still did not set forth the correct

facts with respect to his stock purchases and that, on September 17th, 1974, additional information with respect to the stock purchases of RANDOLPH was supplied to the Appellee's attorney and annexed to an affidavit of MERRILL SANDS (JA 321-334). Based on this voluntary further submission of further information, which was done in accordance with the requirements of responsible litigation, the Appellee claims that the original RANDOLPH interrogatory answers were therefore deficient. While this point was made before the District Judge the said Judge did not so hold and, since the Appellee has not Cross-Appealed, this issue is not before this Court. In any event, of course, a responsible litigator, once he determines that information previously submitted is incorrect, or that further information should be submitted to an adverse party, he will, of course, do so.

Appellee claims that Appellants' attorney committed "fraud" on him and his client by representing to him that the original answers signed by all parties were in his office on September 5th, 1974 when, in fact, they were not. No such representation was, in fact, made, except to the extent that Appellants' attorney relied on the statement of MERRILL SANDS. In any event Appellee's attorney did not rely upon any such statement but demanded to physically see the interrogatory answers at Appellants' attorney's office. (Parenthetically, of course, had Appellants' attorney known that the answers had not all been received he would not have made an appointment on September 10th, 1974 to meet with Appellee's attorney at his office.)

While the alleged issue is clearly irrelevant to the matter before this Court the undisputed facts are insufficent to give rise to any claim of "fraud". Thus, in order to prove fraud, as set forth in Lack Industries Incorporated vs. Ralston Purina Company, 327 Fed. (2nd) 266 (8 Cir. 1964) a material misrepresentation must be shown. Thus, in Lack on page 277 of the opinion, the Court held as follows:

> " * * * It is true that a false representation in respect of an immaterial fact, as it can occasion no injury, is not ground for relief. * * *"

Even if the claimed representation was made, of course, since Appellants' attorney believed that it was true, the required "scienter" would be lacking. Thus, in Bailey vs. Diamond International, 47 App. Div. (2nd) 363, 365 the Court held as follows:

> "* * To sustain a cause of action in fraud there must be a representation of fact which is untrue and known to be untrue * * *offered to deceive the other party and induce him to act upon it, causing injury.* * *"

There is no evidence that Appellants' attorney knew, prior to September 10th, 1974 (late in the day) that he had not received the signed interrogatory answers of GARY MICHAEL and MICHAEL FAGAN.

Nor, of course, can the Appellee prove reliance on any such representation. In his testimony Appellee's attorney stated the following:

papers to Appellee's attorney. The following statements from the testimony of Mr. Eno makes this clear (JA 217)

"Q. Have you received ribbon copies or photo copies?

A. Well, its very easy to tell. We have our file here. I can riffle through it.

Q. Can you do that for me please?

A. Surely

THE COURT: You mean carbons or photos?

Q. That's right, carbons or photos?

A. I know I have received carbons from you.

Q. I just want to know if you have received any photos?

A. I am sure that I have. Here is one of them and here is another one. Here is another one.

(JA 209) (Direct Testimony of Mr. Eno)

> "* * * I said that was unsatisfactory; I wanted to see them (the original interrogatory answers) that day, and I said to him (Mr. Bader) 'I don't believe that you have them"* * *"

Thus, of course, there is no "reliance" on any claimed "misrepresentation" and the matter is completely irrelevant.

Appellee's attorney also claims that since his telephone record indicated that Appellants' attorney had stated that he would send "photo-copies of original answers" that this was a representation that he (Appellants' attorney) knew that he did not have the original answers in his office at the time that the claimed representations were made. This is just not true. Appellants' attorney had repeatedly given photo copies of papers to Appellee's attorney. The following

Appellee seeks to claim, in various parts of its brief, that certain factual statements made by Appellants' attorney were not correct. In particular Appellee claims that the statement made by Appellants' attorney to the effect that the IIPL answers were "properly conformed" in a letter to the Court was not correct. The other attorneys for the defendants in this action (three other firms) have made no objection to the IIPL answers. Hence, with respect to these firms, it must be assumed that the copies of IIPL answers were "properly conformed". With respect to the copy of the IIPL answers served on the Rosenman firm (JA 232) it is noted that these answers bear an indication that they were signed by MERRILL SANDS. The failure to fill in the jurat is, under State Law, not a significant variance. Therefore as Appellants' attorney properly stated, these copies were "properly conformed".

Appellee then states that Appellants' attorney has not made any flat statement under oath that the signature on the interrogatory copy served upon the Rosenman firm was in the handwriting of SANDS. The evidence of this fact is the comparison with the handwriting of SANDS on JA 232 and the conceded handwriting of SANDS on JA 636. These signatures appear to be written by the same party. SANDS was not asked the question during the course of his testimony but the comparison speaks for itself.

The Court, of course, incorrectly found that Sands did not sign the interrogatory answers involved on September 5th, 1974. It based its finding on the testimony of DOROTHY BLACKER who made no such

admission. In making such finding, of course, the District Judge rejected the testimony of both BADER and of SANDS to the effect that the answers were signed on September 5th, 1974. BLACKER, however, did not contradict the testimony of BADER to the effect that the "September 5th" date appearing on the copy of the answers served was actually typed on September 4th, 1974 pursuant to Appellants' Attorney's instructions. In the quoted excerpt from BLACKER's testimony (Appellants' Brief page 42) the Court asked BLACKER if she customarily placed a date on a document other than the date upon which she typed it. BLACKER correctly testified that she did so "very rarely" and, when confronted with the implication that she "customarily" did so quite properly stated "no". She did not, of course, remember anything substantive with respect to the September 5th, 1974 date and her testimony as set forth in the Appellants' Main Brief so shows.

POINT THREE
THE CONDUCT OF APPELLANTS' ATTORNEY BADER IN THIS MATTER WAS FULLY IN ACCORD WITH PROFESSIONAL ETHICS AND WAS MANDATED UNDER THE FACTS.

DR 7-101 requires an attorney, in representing a client, to affirmatively act as follows:

> (A) A lawyer shall not intentionally:
>
> (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law * * *
>
> (2) Prejudice or damage his client during the course of the professional relationship * * *"

Under the conceded facts as they occurred on September 5th, 1974 (to the extent of the knowledge of the Appellants' attorney on that date) had the Appellants' attorney deliberately mailed copies of interrogatory answers to the Rosenman firm (which he did, of course, not do) this would be the proper procedure even if the answers had not been received by him on that date. Cabales vs. United States, 51 FRD 498 affirmed 447 Fed.(2nd) 1358 (2 Cir 1971) indicates that, where a party is required to answer interrogatories by a specific date, and the answers have not been received by his client, he should forward draft copies of answers to the adverse counsel and follow it up with the actual answers when received. (In Cabales, as pointed out by the District Court, the attorney did not follow up the draft answers with actually signed answers by his client, and, for this reason, the Complaint was dismissed. In the case at Bar assuming arguendo that signed copies of these answers were not in the office of Appellants' attorney on September 5th, 1974 it was then incumbent upon him to mail draft copies to the adverse counsel to make as full compliance as he could at that time to insure the Court that he was not wilfully disobeying the Order of the Court. Then, as soon as he could, he was to follow it up with signed copies. Thus, after service of the draft copies on September 5th, 1974, Appellants' attorney delivered signed copies of the answers of IIPL and of RANDOLPH to the Appellees attorney on September 11th, 1977. On September 18th, 1974 (prior to the hearing on the Appellee's Rule 37 motion on September 20th, 1974) Appellants' attorney delivered signed copies of the answers of GARY MICHAEL (even though he was not a plaintiff at the time) (See JA 545-547). Also, a letter

was sent to plaintiff MICHAEL FAGAN (JA 463) pointing out that unless FAGAN supplied signed interrogatory answers his Complaint would be dismissed. This is the manner in which a responsible attorney involved in litigation would act and is perfectly justified by the Rules. It demonstrates, of course, no desire on the part of either Appellants' attorney, or any of his clients, to wilfully disobey the Order of the Court.

POINT FOUR
APPELLEE'S ATTORNEY ENO WAS GUILTY OF MISCONDUCT IN THIS ACTION

Since misconduct of an attorney, in litigation, has been held by this Court to be a matter for the grievance committee and not for this Court the undersigned merely mentions these facts to indicate the "bad blood" existing between counsel in this case. The difference in attitude of opposing counsel representing the same client (TOUCE ROSS) of the SHEA, GOULD firm and the ROSENMAN firm is striking. Had the Appellants' attorney realized the type of tactics to which he was going to be subjected by the ROSENMAN firm the manner in which this litigation was handled would have been far different. However, while making much of claimed misconduct on the part of Appellants' attorney in its brief, Appellee minimizes the clear misconduct on the part of its attorney ENO. (For reasons best known to himself, while ENO was actively engaged in both the proceedings before the District Court and in proceedings involving this appeal, he has dissociated himself from appearing on the Appellee's brief or arguing the appeal).

Appellant has already called this Court's attention to one admittedly false affidavit made by ENO (which was only corrected at the "tail end" of the hearings after the evidence submitted by BADER and SANDS indicated that the single envelope, admitted to have been received, was too small to contain the IIPL interrogatory answers). ENO also still did not admit that the answers of RANDOLPH, FAGAN and GARY MICHAEL had been sent in a different envelope but claimed that he did not know in what envelope these answers had been mailed.

ENO submitted an affidavit which contradicted the Court's own notes and BADER's testimony although he now attempts to supply a lame explanation of the variance by implying that the Court did not take complete notes.

ENO submitted a misleading affidavit with respect to the mailing of the original answers by RANDOLPH and attempts to justify this by stating that, despite the clear non-sequitor of the true facts, the affidavit was true as written. This is similar to the Bowdlerized version of a well known street saying that "If my grandmother had wheels she would be a Bus."

In the draft Supplemental Brief (submitted to this Court and Adverse Counsel, but not officially filed since permission to file was not granted by the Court), Appellants call attention to yet another false and misleading affidavit by ENO. This affidavit appears at JA 477, was signed by ENO on September 13th, 1974 and reads in part as follows:

" * * * It thus appears that in the cases of Michael and Fagan what Mr. Bader sent to us on September 5th, 1974 were drafts of proposed further answers by those plaintiffs, and that those drafts were sent to us (and we believe to other counsel) in an effort to mislead us (and them) into believing that those plaintiffs had made timely responses to the Interrogatories as ordered by the Court on August 16th, 1974. * * *"

In his testimony, however, ENO, after these interrogatory answers were shown concededly to have been mailed only to his firm, contradicted this affidavit as follows: (JA 214),

Q. Prior to the time that these matters happened were you in touch with those other firms with respect to what was going on in the case?

A. From time to time.

Q. Did you ever check with those firms to see whether or not they got copies of those Randolph, Fagan and Michael interrogatory answers?

A. I do not.

Q. You don't know to this day whether they did or did not, do you?

A. I do not, no.

It is submitted that the above facts indicate proof of the point made.

POINT FIVE
THE USE BY THE COURT OF HIS NOTES AS TO WHAT OCCURRED DURING ARGUMENT OF A MOTION BEFORE HIM AND THE USE BY ADVERSE COUNSEL OF HIS NOTES AS TO WHAT OCCURRED AT SUCH HEARING IS A FIFTH AMENDMENT VIOLATION

In order to support a claim that Appellants' attorney had made "false statements" and had given "false testimony" the District Court relied on "notes" taken by ENO as to what had transpired at a hearing before the District Court on September 20th, 1974 which had not been transcribed stenographically. These so-called "notes" were made by ENO after the hearing was closed and after ENO had returned to his office. ENO admits that no notes were contemporaneously made by him at the time of the hearing.

Obviously, the use of "notes" (either by the Court or by Adverse Counsel) as to what transpired at a hearing which was unrecorded is a clear "due process" Fifth Amendment violation. No memorialization of the statements made at the hearing was made. Recollections of what transpired are, of course, subject to serious error. Indeed, even at a hearing where a stenographic record is taken attorneys have a tendency to "mis-speak". On this point reference is made to the recent article in the New York Times of September 30th, 1977 entitled The Days and Data Pile Up at the IBM Trial. The following quotation is illustrative:

> "* * * In fact, so many exhibits were floating around that witnesses and attorneys frequently got them jumbled. They would say 2946 when they really meant 4926. They would say 3980C when they meant 3980B. 'I believe you misspoke' a correcting party would thunder."

Furthermore, even if BADER had made statements before the Court as to facts these statements would be outside of the record.

The term "Due Process of Law" is traditionally defined to mean, at least, those rights granted to a party in traditional common-law jurisprudence. A basic right involves the use of an impartially produced record of any oral testimony given at any Court Hearing. This is mandated so that a Court's decision can be properly reviewed by an Appellate Court on the basis of an impartially produced record. Where a motion is involved the sole basis for the record consists of the papers submitted in support of the motion.

Thus the District Court is not entitled to utilize alleged oral statements made on the argument of a motion to contradict subsequent sworn testimony, taken stenographically.

Appellee contends that, even assuming the truth of the above statements, an attorney is not permitted to consciously mislead a Court. This is, of course, true. However any such charge is one relating to the conduct of an attorney and is a matter for the Grievance Committee and not for this Court.

There is, of course, a serious factual dispute as to the statements made by Appellants' attorney at the argument of the motion on September 20th,1974. The Court's notes, the recollection of Appellants' attorney, and the recollection of Appellee's attorney ENO are in conflict. The probative value of ENO's alleged "notes" (concededly taken after the argument of the motion on September 20th,1974 at his office when recollection would obviously be faulty)is obviously, even if ENO's credibility was not destroyed by the false affidavits referred

to supra, is nil.

The use by the District Judge of his notes as constituting an alleged basis for findings as to what went on at the argument of a motion before him is likewise a very serious "Due Process" violation (particularly when an attorney is involved). No attorney, who appears consistently before a District Judge, would dare to imply to the Judge that his notes were in error. Furthermore, of course, if a Judge is intending to utilize his notes as memorialization of statements which occurred before him due process would require that the Judge tender his notes to both parties at the end of the argument to insure that they constituted an accurate factual representation. Such a requirement would hamstring a Judge in carrying out his judicial functions. Hence the proper rule, as set forth in Appellants' Main Brief, is that such notes, either by an adverse counsel or by the Court are not part of any record and have no probative value.

Indeed there is even a question that the conduct of Appellee's attorney ENO may be in violation of the Disciplinary Rules of the Code of Professional Responsibility. Opinion 328 of the New York State Bar Association (1974) specifically holds that an attorney's recording of a conversation electronically with another attorney without his consent is a Code violation. It is submitted that recording an attorney's statements by written notes without informing the attorney that such recording is being made, at an argument of a motion which is not being

recorded stenographically, is a similar violation. Of course, had ENO supplied these notes to Appellants' attorney prior to utilization thereof at the formal stenographically recorded hearings before Judge Owen the Appellants' attorney would have asked that the notes be corrected and compared also with the Judge's notes.

Finally Appellee contends that, since no objection was made by Appellants to the receipt in evidence of both the Judge's notes and the notes of the Appellee's attorney ENO, the point cannot be raised on appeal for the first time.Appellee cites United States vs. Rose, 525 Fed.(2nd) 1026 as authority.Appellee ignores the footnote in that opinion reading as follows:

> "* * * This general rule is, of course, subject to the appellate court's discretion in recognizing plain error affecting substantial rights.* * *"

It is submitted that Appellants' attorney could not object to the use of the Judge's notes without "infuriating" the District Judge and, in effect, attacking his integrity. Is it conceivable that a party, particularly an attorney, would have the strength to imply that the Court's notes were in error?

POINT SIX
THE DISTRICT JUDGE, UNDER THE FACTS NOW REVEALED IN THIS CASE WAS REQUIRED TO RECUSE HIMSELF

Subsequent to the decision of the Court on January 9th,1976 and the publication of this decision in the New York Law Journal and the publication in the New York Law Journal of

the decision of this Court dismissing the first appeal taken in this case, the Appellants' attorney received an annonymous telephone call calling attention to the acquaintance of Judge Owen and Appellee's attorney ENO. Appellee, in his brief, attempts to cast aspersions on the manner in which this information was received by Appellants' attorney. The circumstances, of course, are understandable. Obviously someone (probably a member of the Bar) wanted Appellants' attorney to have this information but was unwilling to identify himself.

In any event the information was proven correct by the response of Appellee's attorney ENO to the letter of Appellants' attorney (JA 886-887). However further information relative to the specifics of the acquaintance between ENO and JUDGE OWEN were refused (JA 891). A similar letter addressed to Mr. Walpin (who is the person arguing this appeal for Appellee) remains unanswered (See Exhibit B annexed to this brief).

Failure on the part of an attorney to reveal his acquaintance with a Judge is a violation of the Code of Professional Responsibility. It violates DR 1-102(5) as consisting of conduct which is prejudical to the administration of justice. It is entirely possible that, had an application been made to Judge Owen to recuse himself prior to the making of his determination of January 9th, 1976, he might have recused himself on his own motion. Thus the concealment by ENO

of the material facts involved caused substantial prejudice to the Appellants.

The District Judge, in his opinion reproduced on JA 941, refusing to recuse himself, stated the following:

> " * * The motion to recuse, not formally before me in motion papers, but nevertheless suggested by certain affidavits filed herein, based on my acquaintance with Lawrence R. Eno,Esq. over the years, is frivolous and is denied.* *" (emphasis supplied).

It is submitted that, based on the facts already known, (which are by no means complete), recusal of the District Judge was mandatory in this matter.

A recent determination of the Court on the Judiciary of the State of New York relating to Supreme Court Justice Vaccaro is illustrative. Thus the Justice was suspended for six months without pay, even though no improprieties were involved, when he presided in cases wherein a partner of his law secretary was involved. See Exhibit C annexed to this brief.

Without detailing the Judge or the attorney involved, the undersigned also obtained an opinion from the former dean of Hofstra University Law School, who is an authority on ethics who stated that, in his opinion, the District Judge, under the circumstances, should have disqualified himself.

Assuming, also, arguendo, that the District Judge, in this case, was not legally disqualified to sit,he should have disqualified himself under the rationale of Winters vs. Travia, 495 Fed(2nd) 839, 842 where the Court said:

> "* * * Important as it was

that people should get justice, it was even more important that they should be made to feel and see that they were getting it.* *"

Also, of course, in this case, where the credibility of two attorney-witnesses is being weighed by the District Judge, one is a long time acquaintance of said Judge and the other is not known to him, it is submitted that the impartiality of the District Judge, as a trier of the facts, might reasonably be questioned. Thus the District Judge should recuse himself under Canon 3 of the Canons of Judicial Ethics.

Appellee claims that a formal motion to recuse, based on an affidavit of prejudice, was not made in this case. Regardless of the fact that such motion is not required in all cases, the District Judge treated the letter application to recuse him and the affidavits submitted in support thereof as a "motion to recuse" and so states in his opinion.

POINT SEVEN
A JURY TRIAL IS REQUIRED IN THIS CASE IF FACTUAL ISSUES ARE PRESENT. IN ADDITION APPELLANTS ARE ENTITLED TO A JURY TRIAL WITH RESPECT TO THE AMOUNT OF ATTORNEYS' FEES, IF ANY TO BE AWARDED UNDER RULE 37.

Appellee claims that a jury trial is not required in this case since it is the Court, and not a jury, who determines compliance with his Order and, if he finds that his Order has not been complied with, fixes the penalty.

While the right to Jury Trial on Rule 37 applications does not appear to have been squarely decided there are sufficient analagous cases that indicate that, in the case at Bar, such Jury Trial is mandated.

Where the facts with respect to compliance or lack of compliance with an order are undisputed, or where a mere question of law is involved, then it is for the Court, and not for a jury, to determine compliance or lack of compliance. Thus, for example, a Court has the right to decide if the answers to interrogatories are responsive or not, whether there was an attempt to respond, etc.

However where there are disputed facts as to compliance as, in this case, (i.e. were the RANDOLPH answers received in the office of the Appellants' attorney by September 5th,1974; did SANDS sign the answers on September 5th,1974; did FAGAN mail his answers to the Appellants' attorney prior to September 5th, 1974) then the question must be decided by a jury. Otherwise, in the guise of determining compliance with an order based upon matters requiring factual findings, the right to a Jury Trial on factual issues based on the Seventh Amendment would be destroyed.

Also, since Rule 37 sanctions are in the nature of a statutory penalty, a demand for a jury to determine the amount of such penalty would also be required. See, for example, the case of United States vs. J.B. Williams Company,Inc., 498 Fed. (2nd) 414 and Bloom vs. Illinois, 391 US 194. Bloom, incidentally,

overrules In Re Debs, cited by Appellee.

The award of attorneys' fees, under Rule 37, is analagous to a statutory penalty. Since a jury trial is required with respect to the award of a statutory penalty it is also required with respect to an award of attorneys' fees under Rule 37. This Court should extend Williams to establish the principle of law involved.

Appellants, of course, contend that the Order of the District Court was either complied with or complied with as required by Rule 61. In such case the points with respect to recusal of the District Judge, evidentiary errors, the right to jury trial, etc. would be mooted.

CONCLUSION

THE DETERMINATION OF THE DISTRICT COURT DISMISSING THE COMPLAINT AGAINST THE PLAINTIFFS IIPL, RANDOLPH AND FAGAN AND IN FAVOR OF THE DEFENDANT TOUCHE ROSS SHOULD BE IN ALL RESPECTS REVERSED. THE COMPLAINT SHOULD EITHER BE REINSTATED BY THE PLAINTIFFS NAMED HEREIN OR THE NOTICES OF VOLUNTARY DISMISSAL SHOULD BE SUSTAINED AND THE COMPLAINT DISMISSED WITHOUT PREJUDICE AGAINST ALL DEFENDANTS. THE AWARD OF ATTORNEYS FEES AGAINST THE PLAINTIFFS IIPL AND I. WALTON BADER SHOULD BE IN ALL RESPECTS SET ASIDE.

Respectfully submitted

I. Walton Bader
BADER and BADER
Attorneys for Appellants
65 Court Street
White Plains NY 10601
914-682-0072

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY LEWIS, et al,	73 Civ. 3929	:	CONSOLIDATED
	73 Civ. 4109		CLASS ACTION
Plaintiffs,	73 Civ. 4133	:	COMPLAINT
	73 Civ. 4895		
v.	73 Civ. 3025	:	
	74 Civ. 3281		
TELEPROMPTER CORP., et al.,	74 Civ. 4341	:	
Defendants.		:	
Consolidated Action			
		:	

Plaintiffs, by lead counsel, Wolf Popper Ross Wolf & Jones, respectively allege upon information and belief, as follows:

CLASS ACTION
ON BEHALF OF ALL PLAINTIFFS
EXCEPT PLAINTIFFS IN 73 CIV. 4133
AGAINST DEFENDANTS TELEPROMPTER
CORP., TOUCHE, ROSS & CO., JACK
KENT COOKE, RAYMOND P. SHAFER,
WILLIAM J. BRESNAN, HUBERT J.
SCHLAFLY, BERLE ADAMS, MARVYN
CARTON, RALPH F. LEWIS, PHILIP L.
LOWE, CHARLES LUCKMAN, MAURICE B.
MITCHELL, ALLEN E. PUCKETT
JOHN H. RICHARDSON, MONTE E.
LIVINGSTON, JACK D. WRATHER, JR.,
J. M. GARTENLAUB, J. R. BARRINGTON,
LEONARD TOW, ROBERT C. TODD, JR.,
LESLIE H. READ, ROGER G. WILSON,
HUGH E. FLAHERTY, BERNARD D. FISCHMAN,
J. B. GREEN, and B. P. SIMON

1. This action arises under the Securities Exchange Act of 1934, as amended, 15 U.S.C.A. § 78a, et seq. (hereinafter called the "Exchange Act") and the common law. Jurisdiction is conferred upon this Court by 15 U.S.C.A. § 78aa and the principle of pendent jurisdiction.

AREA CODE 212
LEXINGTON 2-5860
AREA CODE 914
682-0072

EXHIBIT B

CABLE ADDRESS: "BAPATENTS" NEW YORK
TELEX: BABKLN 666244 UW

LAW OFFICES
BADER AND BADER
65 COURT STREET
WHITE PLAINS, N. Y. 10601

DR. MAXIMILIAN BADER
DR. I. WALTON BADER
MILTON BADER
BENEDICT BADER (MASS. BAR)

REPRESENTED IN WASHINGTON, D. C.

October 8th, 1977

Re: IIPL vs. Teleprompter
Dockets 77-7187; 77-7271;77-7273

Gerald Walpin, Esq.
Rosenman, Colin, Freund, Lewis & Cohen
575 Madison Avenue
New York, N. Y. 10022

Dear Mr. Walpin,

I again refer to our correspondence regarding your acquaintance (if any) with Judge Owen and my request for a copy of the envelope in which a copy of the "Appellants' Supplemental Brief" was mailed to your office by my printer.

Since the matter will be argued before the Court of Appeals on October 17th, 1977 I hope that I will receive this information prior to the argument thereof.

Very truly yours,

I. Walton Bader

IWB/iwb

EXHIBIT C

6 Months Without Pay for Justice Vaccaro

Court on Judiciary Suspends Brooklyn Judge for Misconduct

Justice Frank Vaccaro, of Supreme Court, Kings County, was suspended without pay for six months yesterday by the Court on the Judiciary for violations of the Code of Judicial Conduct in accepting a special favor and failing to disqualify himself from cases in which friends of his were litigants. The five-judge court sustained four of eleven charges in which his conduct "was injudicious and improper and, as such, constituted a serious transgression of the Code of Judicial Conduct and the Canons of Judicial Ethics." The misconduct occurred from 1970 to 1972, when Justice Vaccaro was a Civil Court judge.

No Corruption

The findings by the court, in sustaining a referee's report, are published today under Court on the Judiciary. The findings noted, however, that there was "no evidence in this record of corruption, general neglect of duty, acts violative of law inspired by self-interest, oppressive and arbitrary conduct, reckless disregard of litigants' rights or any finding that respondent's future retention of office is inconsistent with the fair and proper administration of justice in this state."

The court listed the following acts of judicial misconduct perpetrated by the judge:

• Signed fictitious names for himself and his wife on a registration card at a Catskill hotel, "thereby concealing his presence as a guest of the law firm of Gerberbaum, Garson & Goldberg" from July 14 to 16, 1972.

• Accepted the weekend stay, valued at $178.02, as a gift from Gerald Garson or his law firm.

• Between 1970 and 1972 failed to disqualify himself from presiding over Civil Court cases in which a law partner of his law secretary appeared before him.

• Sat on a case in small claims court in which "his long-time friend (Gerald Garson) appeared as a party-defendant." The case involved a $106.81 claim and while "there were no allegations or evidence that the defendant received any preferential treatment or that an injustice was perpetrated," the court said it was a judicial impropriety for him to preside over the matter.

The per curiam opinion, in reference to the Civil Court cases, pointed out that Justice Vaccaro was a member of a "troika" which handled thousands of cases during the three-year period.

Public Procedures

"It must be observed that the settlement procedures described were carried on virtually publicly and mostly by the same groups of lawyers for both sides, long accustomed to dealing with each other in a mass effort to dispose of great numbers of calendar-clogging cases in what might be characterized as a settlement mill," the court said.

"In the circumstances there could have been no opportunity, even assuming such a desire, for anything untoward to have taken place. Nevertheless, it was an exercise of poor judgment for respondent to have presided in these cases."

The six-month suspension imposed upon Justice Vaccaro is without pay. The allegations of judicial misconduct were brought by the Commission on Judicial Conduct. Justice Joseph DiFede was the referee who presided at hearings last March.

BADER Independent Investor v. Bader.

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 11 day of Oct. 1977 deponent served the within Reply Brief upon

Rosenman, Colin, Freund, Lewis & Cohen, Esqs.

attorney(s) for

Appellee

in this action, at

575 Madison Ave., NYC 10022

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 11 day of Oct., 1977.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978